

To: "Massman, Claudia" [clmassman@mt.gov]
Cc: []
Bcc: []
From: CN=Erin Perkins/OU=RC/OU=R8/O=USEPA/C=US
Sent: Tue 3/22/2011 2:43:24 PM
Subject: RE: Re. SB 367
[FR44.pdf](#)
[ATT1JX6S.pdf](#)
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Hi Claudia -

Attached are the Fed. Reg. excerpt and the 1977 CFR citation. The FR excerpt has the relevant analysis from the OGC opinion so at this point it is probably best to review that...

Erin

From: "Massman, Claudia" <clmassman@mt.gov>
To: Erin Perkins/RC/R8/USEPA/US@EPA
Date: 03/21/2011 01:50 PM
Subject: RE: Re. SB 367

Erin -

I have not been able to retrieve the documents listed below from Lexis or Google. Could you either send me the links or fax the documents? Thanks.

Claudia

-----Original Message-----

From: Perkins.Erin@epamail.epa.gov [mailto:Perkins.Erin@epamail.epa.gov]
Sent: Monday, March 21, 2011 10:57 AM
To: Massman, Claudia
Subject: Re. SB 367

Hi Claudia -

In preparation for tomorrow's discussion regarding SB 367, I wanted to send you the following citations for you to review -

44 Fed. Reg. 39508 (July 6, 1979)

Environmental Protection Agency (E.P.A.)
Office of the General Counsel

NPDES Permits
IN RE BETHLEHEM STEEL CORPORATION
Opinion No. 58
March 29, 1977

Available at 1977 WL 28245 (E.P.A.G.C.)

40 CFR 130.17 from the 1977 CFR

(See attached file: OW Variance Memo 1985.pdf)

Please let me know if you have any questions. My phone number is (303) 312-6922.

Thanks,

Erin

Appendix B—Excerpts From United States Environmental Protection Agency Washington, D.C.

Decision of the General Counsel on Matters of Law Pursuant to 40 CFR 125.36(m)

In reaching this conclusion, I do not mean to suggest that all variance procedures contained in State water quality standards are illegal and unacceptable under the FWPCA. In Decision of the General Counsel #44, I specifically considered the question of an Illinois variance procedure. The Illinois procedure allowed for a limited exception to meeting a water quality standard upon a showing that compliance "would impose an arbitrary or unreasonable hardship." In my decision, I held that EPA would not itself provide for the hearing to determine whether a discharger qualified for such a variance, but would incorporate a State-determined variance in an NPDES permit.

It is important to distinguish the type of variance in Illinois from the variance presented by this case. Section 101(a)(2) of the FWPCA sets as an interim goal the achievement of water quality wherever attainable, that provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by July 1, 1983. In order to attain this goal, EPA has required States to set their water quality standards at such levels "wherever attainable." EPA regulations provide that "in determining whether such standards are attainable for any particular segment, the State should take into consideration environmental, technological, social, economic, and institutional factors." 40 CFR 130.17(c)(1). EPA's regulation are more specific in regard to downgrading existing water quality standards. Standards may be lowered only when the State can demonstrate that one of three factual situations exists:

- (i) The existing designated use is not attainable because of natural background;
- (ii) The existing designated use is not attainable because of irretrievable man-induced conditions; or
- (iii) Applications of effluent limitations for existing sources more stringent than those required pursuant to Section 301(b)(2)(A) and (B) of the act in order to attain the existing designated use would result in substantial and widespread adverse economic and social impact.

Thus, under these regulations, a State may downgrade a water quality standard for a particular stream segment

if attaining the standard will require treatment in excess of best available technology ("BAT") for industrial point sources of best practicable waste treatment technology ("BPWTT") for publicly-owned treatment works, and such additional treatment would result in "substantial and widespread" impact.

A number of States, however, have adopted a somewhat different approach. Rather than downgrading the standard for an entire stream, or stream segment, some States have maintained the standard, but provided that individual dischargers may receive variances for a limited time period from meeting the standards. This approach appears to be preferable environmentally. The more stringent standard is maintained and is binding upon all other dischargers on the stream or stream segment. Even the discharger who is given a variance for one particular constituent (e.g., chloring) will be required to meet the applicable criteria for other constituents. The variance is given for a limited time period and the discharger must either meet the standard upon the expiration of this time period or must make a new demonstration of "unattainability."

EPA will accept such variance procedures as part of State water quality standards as long as they are consistent with the substantive requirements of 40 CFR 130.17. Therefore, variances can be granted by States only when achieving the standards is "unattainable." In demonstrating that meeting the standard is unattainable, the State must demonstrate that treatment in excess of that required pursuant to Section 301(b)(2)(A) and (B) of the Act is necessary to meet the standard and must also demonstrate that requiring such treatment will result in substantial and widespread economic and social impact which exceeds the positive economic and social impact of enhanced water quality. EPA Regional Administrators should not accept State variance determinations unless they are accompanied with an adequate record to support the determinations.

The justification submitted by the State should include documentation that treatment more advanced than that required by Sections 301(b)(2)(A) and (B) has been carefully considered and that alternative effluent control strategies have been evaluated.

Since State variance proceedings involve revisions of water quality standards, they must be subjected to public notice, opportunity for comment, and public hearing. (See Section 303(c)(1) and 40 CFR 130.17(a)). The

public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

Total maximum daily loads included in any plan prepared pursuant to Sections 208 or 303(d) and (e) must be adjusted to reflect the variance. The granting of a variance to any one discharger should not affect the load allocations or effluent limitations required for other dischargers on the stream segment.

[FR Doc. 79-20334 Filed 7-5-79; 8:45 am]

BILLING CODE 6560-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[44 CFR Part 67]

[Docket No. FI-5613]

Proposed Flood Elevation Determinations for the City of Rocky River, Cuyahoga County, Ohio Under the National Flood Insurance Program

AGENCY: Office of Federal Insurance and Hazard Mitigation, FEMA.

ACTION: Correction of proposed rule.

SUMMARY: The notice published on March 17, 1978, at 43 FR 11507 in the *Federal Register* and in the *Sun Herald* on December 29, 1977, and January 5, 1978, should be corrected to read as follows:

Technical information or comments are solicited on the proposed base (100-year) flood elevations listed below and proposed changes to base flood evaluations for selected locations in the City of Rocky River, Cuyahoga County, Ohio.

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

The period for comment will be ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in the above-named community.

ADDRESSES: Maps and other information showing the detailed outlines of the flood-prone areas and the proposed base (100-year) flood evaluations are available for review at the Rocky River City Hall. Send comments to: The Honorable Earl Martin, Mayor of Rocky River, 20200 Karmer Drive, Rocky River, Ohio 44116.

(d) The policy advisory committee for designated areawide planning areas shall include representatives of the State and public and may include representatives of the U.S. Departments of Agriculture, Army, and the Interior, and such other Federal and local agencies as may be appropriate in the opinion of EPA, the State(s), and the designated areawide planning agency.

(e) The State shall provide for interstate cooperation (and where necessary, in conjunction with and under the direction of appropriate Federal agencies should provide for international cooperation) whenever a plan involves the interests of more than one State. When a water quality management plan or portion of a plan is under development or is being implemented in the State for an area affecting or affected by waters of one or more other States, the State shall cooperate and coordinate with each such other State in the development and implementation of the water quality management plan pertinent to such area. EPA will provide assistance, upon request, to assure the appropriate cooperation and coordination between other States and Federal agencies.

§ 130.17 Water quality standards.

(a) The State shall hold public hearings for the purpose of reviewing water quality standards and shall adopt revisions to water quality standards, as appropriate, at least once every three years and submit such revisions to the appropriate Regional Administrator pursuant to section 303(c) of the Act.

(b) The water quality standards of the State shall:

(1) Protect the public health or welfare, enhance the quality of water and serve the purposes of the Act;

(2) Specify appropriate water uses to be achieved and protected, taking into consideration the use and value of water for public water supplies, propagation of fish, shellfish, and wildlife, recreation purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation; and

(3) Specify appropriate water quality criteria necessary to support those water uses designated pursuant to § 130.17(b) (2).

(c) In reviewing and revising its water quality standards pursuant to § 130.17 (a), the State shall adhere the following principles:

(1) The State shall establish water quality standards which will result in the achievement of the national water quality goal specified in section 101(a) (2) of the Act, wherever attainable. In determining whether such standards are attainable for any particular segment, the State should take into consideration environmental, technological, social, economic, and institutional factors.

(2) The State shall maintain those water uses which are currently being attained. Where existing water quality standards specify designated water uses less than those which are presently being achieved, the State shall upgrade its standards to reflect the uses actually being attained.

(3) At a minimum, the State shall maintain those water uses which are currently designated in water quality standards, effective as of the date of these regulations or as subsequently modified in accordance with § 130.17(c) (1) and (2). The State may establish less restrictive uses than those contained in existing water quality standards, however, only where the State can demonstrate that:

(i) The existing designated use is not attainable because of natural background;

(ii) The existing designated use is not attainable because of irretrievable man-induced conditions; or

(iii) Application of effluent limitations for existing sources more stringent than those required pursuant to section 301(b) (2) (A) and (B) of the Act in order to attain the existing designated use would result in substantial and widespread adverse economic and social impact.

(4) The State shall take into consideration the water quality standards of downstream waters and shall assure that its water quality standards provide for the attainment of the water quality standards of downstream waters.

(d) The Regional Administrator shall approve or disapprove any proposed revisions of water quality standards in accordance with the provisions of section 303(c) (2) of the Act.

(e) The State shall develop and adopt a Statewide antidegradation policy and identify the methods for implementing such policy pursuant to § 130.10(b) (2). The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses shall be maintained and protected. No further water quality degradation which

would interfere with or become injurious to existing instream water uses is allowable.

(2) Existing high quality waters which exceed those levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water shall be maintained and protected unless the State chooses, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, to allow lower water quality as a result of necessary and justifiable economic or social development. In no event, however, may degradation of water quality interfere with or become injurious to existing instream water uses. Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance. Further the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and feasible management or regulatory programs pursuant to section 208 of the Act for nonpoint sources, both existing and proposed.

(3) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

Subpart C—Requirements for State Strategy

§ 130.20 State strategy; contents and submission.

(a) Based on current water quality conditions, evaluation of program achievement to date, water quality management plans developed under this part and Part 131 of this chapter (including basin water quality management plans), and the annual EPA guidance (described in Subpart B of Part 35 of this chapter), each State shall prepare and update annually a State strategy for preventing and controlling water pollution over a five-year period. The strategy shall contain:

(1) A Statewide assessment of water quality problems and the causes of these problems.

(NOTE: This assessment may be based on the water quality analysis used to prepare

the State's report required under Section 305(b) of the Act. Once the water quality assessment pursuant to § 131.11(b) of this chapter and the nonpoint source assessment pursuant to § 131.11(d) of this chapter are developed, the Statewide assessment of water quality problems and causes of these problems should be based on the plan assessments. Such assessments should then be reflected in the State's annual report under section 305(b) of the Act.)

(2) A ranking of each segment based on the Statewide assessment of water quality problems.

(3) An overview of the State's approach to solving its water quality problems identified in paragraph (b) (1) of this section, including a discussion of the extent to which nonpoint sources of pollution will be addressed by the State program.

(4) A year-by-year estimate of the financial resources needed to conduct the program in the State, by major program element (as defined in Subpart B of Part 35 of this chapter).

(5) A listing of the priorities and scheduling of the State's water quality management plan preparation and implementation, areawide plans, and other appropriate program actions to carry out § 130.20(a) (4).

(6) A brief summary of the State monitoring strategy (described in Appendix A to Subpart B of Part 35 of this chapter).

(b) The State strategy shall be submitted annually as part of the annual State program submission pursuant to § 35.555 of this chapter.

Subpart D—Relationship of Planning Process and Other Programs

§ 130.30 Relationship to monitoring and surveillance program.

(a) The State shall assure that an appropriate monitoring program will be established in accordance with provisions of Appendix A to Subpart B of Part 35 of this chapter.

(b) The process shall provide that each water quality management plan shall be based upon the best available monitoring and surveillance data to determine the relationship between instream water quality and sources of pollutants and, where practicable, to determine the relationship between disposal of pollutants on land and groundwater quality.

(c) In areas where a State or designated areawide planning agency determines that a groundwater pollution or contamination problem exists or may ex-